



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XB618]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys Offshore from New York to Massachusetts

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for comments on proposed renewal incidental harassment authorization (IHA).

SUMMARY: NMFS received a request from Ørsted Wind Power North America, LLC, (Ørsted) for the Renewal of their 2020 IHA to take marine mammals incidental marine site characterization surveys, using high-resolution geophysical (HRG) equipment, in coastal waters from New York to Massachusetts. Ørsted is also planning to conduct marine site characterization surveys along one or more potential submarine export cable routes (ECRs). The activities for which Ørsted has requested a Renewal IHA are identical to those covered under the initial IHA, which expired on September 24, 2021. Pursuant to the Marine Mammal Protection Act (MMPA), prior to issuing the initial IHA in 2020, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The Renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed Renewal not previously provided during the initial 30-day comment period. If issued, the Renewal would be effective through September 24, 2022.

DATES: Comments and information must be received no later than **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Written comments should be submitted via email to *ITP.Esch@noaa.gov*.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period.

Comments, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act> without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Carter Esch, Office of Protected Resources, NMFS, (301) 427-8421. Electronic copies of the original application, renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at:

<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not

intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as “mitigation measures”). Monitoring and reporting of such takings are also required. The meaning of key terms such as “take,” “harassment,” and “negligible impact” can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency’s regulations at 50 CFR 216.103.

NMFS’ regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional period not to exceed one year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a Renewal for this activity and requested public comment on a potential Renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time, one-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the **Description of the Specified Activities** section of the initial IHA issuance notice is planned or (2) the activities as described in the **Description of the Specified Activities**

section of the initial IHA issuance notice would not be completed by the time the initial IHA expires and a Renewal would allow for completion of the activities beyond that described in the **DATES** section of the notice of issuance of initial IHA, provided all of the following conditions are met:

(1) A request for Renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that the Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA).

(2) The request for Renewal must include the following:

- An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).
- A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

(3) Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed Renewal. A description of the Renewal process may be found on our website at:

www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals. Any comments received on the potential Renewal, along with

relevant comments on the initial IHA, have been considered in the development of this proposed IHA Renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested Renewal, and agency responses will be summarized in the final notice of our decision.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must evaluate our proposed action (*i.e.*, issuance of incidental harassment authorization) and alternatives with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 of the Companion Manual for NAO 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA Renewal qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA Renewal request.

History of Request

On September 25, 2020, NMFS issued an IHA to Ørsted to take marine mammals incidental to marine site characterization survey activities offshore from New York to Massachusetts in the areas of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS-A 0486/0517, OCS-A 0487, and OCS-A 0500) (Lease Areas) and along potential submarine ECRs to landfall locations from New York to Massachusetts (85 FR 63508, October 8, 2020), effective

from September 25, 2020 through September 24, 2021. On July 8, 2021, NMFS received a request for a Renewal of that initial IHA so that Ørsted can continue survey activities beyond September 24, 2021. Ørsted later communicated that marine site characterization surveys under the Renewal IHA would not begin until 2022. As described in the request for a Renewal IHA, the activities for which incidental take is requested are identical to those covered by the initial authorization. As required, the applicant also provided a monitoring report (available at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-orsted-wind-power-north-america-llc-site-characterization>) which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

NMFS previously issued an IHA to Ørsted for similar activities (84 FR 52464; October 2, 2019); Ørsted complied with all the requirements (*e.g.*, mitigation, monitoring, and reporting) of that IHA.

Description of the Specified Activities and Anticipated Impacts

Ørsted proposes to conduct a second year of marine site characterization surveys, using high-resolution geophysical (HRG) equipment, within the Lease Areas, located approximately 14 miles (mi) (22 kilometers (km)) south of Martha's Vineyard, Massachusetts at its closest point, and proposed ECRs from the Lease Areas to potential shore landing locations for submarine cables associated with offshore wind development along the coast from New York to Massachusetts. The purpose of the marine site characterization surveys is to support site characterization, siting, and engineering design of offshore project facilities, including wind turbine generators (WTGs), offshore substation(s), and submarine cables within the Lease and proposed ECR Areas. The activities covered under the initial IHA have been completed. Ørsted requested a Renewal of the initial IHA issued by NMFS in September 2020 on the basis that they

plan to conduct up to another year of identical activities in the same area as described in the *Detailed Description of the Specified Activities* section of the **Federal Register** notice for the initial proposed IHA (85 FR 48179, August 10, 2020), which can be found at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>.

In their 2020 IHA application, Ørsted estimated it would conduct surveys at a rate of 70 kilometers (km) per survey day. Ørsted defined a survey day as a 24-hour activity day, which could be the sum of multiple partial surveys if less than 70 km is surveyed in 24 hours. Based on the planned 24-hour operations, the survey activities for all survey areas would require 1,302 survey days if one vessel were surveying continuously. However, Ørsted proposed to use an estimated five vessels simultaneously, with a maximum of no more than nine vessels. Therefore, Ørsted planned to complete all survey effort in one year, prior to the expiration of the initial IHA on September 24, 2021; all of the work addressed under the initial IHA was completed prior to the initial IHA expiration date. The Renewal IHA would authorize take, by Level B harassment only (in the form of behavioral disturbance), of 15 species/stocks of marine mammals for a second year of identical survey activities to be completed in one year, in the same area, using survey methods identical to those described in the initial IHA application; therefore, the anticipated effects on marine mammals and the affected stocks also remain the same. The amount of take, by Level B harassment, requested for the Renewal IHA is also identical to that authorized in the initial IHA. All active acoustic sources, mitigation, and monitoring measures would remain exactly as described in the **Federal Register** notice of the issued initial IHA (85 FR 63508, October 8, 2020; 85 FR 71058, November 6, 2020).

Detailed Description of the Activity

A detailed description of the marine site characterization survey activities for which incidental take is proposed here may be found in the **Federal Register** notice of the proposed IHA (85 FR 48179; August 10, 2020) for the initial authorization. As described above, Ørsted completed the survey activities analyzed for the initial IHA by the date the IHA expired (September 24, 2021). The surveys Ørsted proposes to conduct under this Renewal would be a second year of surveys, identical to those described in the initial IHA. The location and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notices. The proposed Renewal IHA would be effective from the date of issuance to September 24, 2022 (one year from the expiration of the initial IHA).

Description of Marine Mammals

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the **Federal Register** notice of the proposed IHA for the initial authorization (85 FR 48179; August 10, 2020). NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports (SARs), Technical Reports (*e.g.*, Pace 2021), information on relevant Unusual Mortality Events (UMEs), and other scientific literature, and determined that neither this nor any other information affects which species or stocks have the potential to be affected or the pertinent information in the **Description of the Marine Mammals in the Area of Specified Activity** contained in the supporting documents for the initial IHA.

The draft 2021 SARs, available online at:

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports>) state that estimated abundance has increased for the Western North Atlantic stocks of common dolphins (from 172,825 (CV = 0.21) to 172,974 (CV = 0.21)), and gray seals (from 27,131 (CV = 0.19) to 27,300 (CV = 0.22)).

Abundance estimates have decreased for the following: the Western North Atlantic stocks of fin whales (from 7,418 (CV = 0.25) to 6,802 (CV = 0.24)), Risso's dolphins (from 35,293 (CV = 0.19) to 35,215 (CV = 0.19)), harbor seals (from 75,834 (CV = 0.15) to 61,336 (CV = 0.22)), and the Canadian East coast stock of minke whales (from 24,202 (CV = 0.3) to 21,968 (CV=0.31)). The abundance estimate for the Western North Atlantic stock of North Atlantic right whales has also been updated in the draft 2021 SAR, which states that right whale abundance has decreased from 428 to 368 (95% CI 356-378) individuals (Hayes *et al.*, 2021).

NMFS has preliminarily determined that neither the updated abundance information presented above nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the **Description of the Marine Mammals in the Area of Specified Activity** contained in the supporting documents for the initial IHA.

Potential Effects on Marine Mammals and their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is proposed here may be found in the **Federal Register** notice of the proposed IHA for the initial authorization (85 FR 48179; August 10, 2020). NMFS has reviewed the most recent information relevant to this proposed Renewal IHA (monitoring data from the initial IHA, recent draft SARs, Technical Reports (*e.g.*, Pace 2021), information on relevant Unusual Mortality Events, and other scientific literature and data), and preliminarily determined that there is no new information that affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the notices of the proposed (85 FR 48179; August 10,

2020) and issued (85 FR 63508; October 8, 2020) IHAs for the initial authorization. The acoustic source types, as well as source levels, applicable to this authorization remain unchanged from the initial IHA. Similarly, the stocks taken, methods of take and type of take (*i.e.*, Level B harassment in the form of behavioral disturbance) remain unchanged from the initial IHA.

In the initial authorization for marine site characterization survey activities, Ørsted used the following parameters to estimate the potential for take: (1) maximum number of survey days that could occur over a 12-month period in each of the identified survey areas; (2) maximum distance each vessel could travel per 24-hour period in each of the identified survey areas; (3) maximum ensonified area; and (4) mean annual marine mammal densities in each of the identified survey areas. The calculated radial distances to the Level B harassment isopleth (160 decibel (dB) root mean square (rms)) from each acoustic source for a subset of representative survey equipment are included in Table 1 (please see the notice of the issued initial IHA for a complete list).

Table 1. Modeled Radial Distances in meters (m) from HRG Survey Equipment to Isopleth Corresponding to Level B Harassment Threshold

| Sound Source | Radial Distance to Level B Harassment Isopleth (m) |
|--|--|
| EdgeTech Chirp 424 | 4 |
| EdgeTech Chirp 512i | 6 |
| EdgeTech Chirp 216 | 12 |
| GeoPulse 5430 | 29 |
| Teledyne Benthos Chirp III | 54 |
| Applied Acoustics Triple plate S-Boom (700/1,000 J) | 76 |
| Applied Acoustics, Dura-spark (500 J/400 tip) | 141 |
| Applied Acoustics, Dura-spark 400+400 | 141 |
| GeoMarine, Geo-Source dual 400 tip sparker | 141 |

The equation for estimating take for all species remains the same as the initial IHA:

$$\text{Estimated Take} = D \times \text{ZOI} \times \# \text{ of days}$$

Where: D = species density (per km²) and ZOI = maximum daily ensonified area

As described in the notices of the proposed (85 FR 48179; August 10, 2020) and issued (85 FR 63508; October 8, 2020) IHAs for the initial authorization, not all noise producing survey equipment/sources will be operated concurrently by each survey vessel on every vessel day. In the initial IHA application, Ørsted calculated conservative ZOIs by applying the maximum radial distance for any category and type of HRG survey equipment considered in its assessment. The maximum distances to the Level B harassment isopleth for impulsive sources (141 m; *e.g.*, sparkers or boomers) and non-impulsive sources (54 m; *e.g.*, Chirps) were used to calculate the ZOIs for the 54 percent and 46 percent of survey days on which each type of survey equipment would be used predominantly, respectively. The resulting ZOIs were 19.8 km² (*e.g.*, sparkers and boomers) and 7.659 km² (*e.g.*, Chirps). The Renewal request applied this exact same approach to calculate ZOIs, resulting in ZOIs for sparkers boomers and Chirps that are identical to those in the initial IHA.

The methodology for calculating take in the initial IHA applies to the proposed Renewal IHA for all species. The result is that the amount of take requested in Ørsted's request for a Renewal IHA is identical to that authorized in the initial IHA. NMFS agrees with Ørsted's request for take and proposes to authorize the same amount of take as described in their request.

Table 2. Renewal IHA Proposed Take by Level B Harassment

| Species | | Abundance Estimate ¹ | Requested Take | % Population |
|----------------------------|-----------------------------------|---------------------------------|----------------|--------------|
| North Atlantic right whale | <i>Eubalaena glacialis</i> | 368 | 37 | 10.05 |
| Humpback whale | <i>Megaptera novaeangliae</i> | 1,396 | 21 | 1.50 |
| Fin whale | <i>Balaenoptera physalus</i> | 6,802 | 36 | 0.53 |
| Sei whale | <i>Balaenoptera borealis</i> | 6,292 | 2 | 0.0 |
| Minke whale | <i>Balaenoptera acutorostrata</i> | 21,968 | 13 | 0.06 |
| Sperm whale | <i>Physeter macrocephalus</i> | 4,349 | 3 | 0.07 |
| Long-finned pilot whale | <i>Globicephala melas</i> | 39,215 | 69 | 0.18 |

| | | | | |
|--------------------------------------|------------------------------|---------|-------|------|
| Bottlenose dolphin (W.N.A. offshore) | <i>Tursiops truncatus</i> | 62,851 | 419 | 0.67 |
| Common dolphin | <i>Delphinus delphis</i> | 172,974 | 2,211 | 1.28 |
| Atlantic white-sided dolphin | <i>Lagenorhynchus acutus</i> | 93,233 | 418 | 0.45 |
| Atlantic spotted dolphin | <i>Stenella frontalis</i> | 35,215 | 7 | 0.02 |
| Risso's dolphin | <i>Grampus griseus</i> | 35,493 | 30 | 0.08 |
| Harbor porpoise | <i>Phocoena phocoena</i> | 95,543 | 916 | 0.96 |
| Harbor seal | <i>Phoca vitulina</i> | 61,336 | 215 | 0.36 |
| Gray seal | <i>Halichoerus grypus</i> | 27,300 | 215 | 0.79 |

W.N.A. = Western North Atlantic.

¹ Abundance estimates have been updated from the initial IHA (85 FR 63508; October 8, 2020) using the 2021 Draft SARs (Hayes *et al.*, 2021).

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures included as requirements in this proposed authorization are identical to those included in the **Federal Register** notice announcing the issuance of the initial IHA (85 FR 63508; October 8, 2020), and the discussion of the least practicable adverse impact included in that document and the notice of the proposed IHA remains applicable. All mitigation, monitoring, and reporting measures in the initial IHA are carried over to this proposed Renewal IHA and summarized below.

- *Ramp-up*: a ramp-up procedure would be used for HRG equipment capable of adjusting energy levels at the start or re-start of survey activities.
- *Protected Species Observers (PSOs)*: A minimum of one NMFS-approved PSO would be on duty and conducting visual observations at all times during daylight hours (*i.e.*, from 30 minutes prior to sunrise through 30 minutes following sunset), and two active duty PSOs would conduct observations 30 minutes prior to and during nighttime ramp-ups of HRG equipment.
- *Exclusion Zones (EZ)*: Marine mammal EZs would be established around the HRG survey equipment and monitored by PSOs during marine site characterization surveys as follows: A 500-m EZ for North Atlantic right whales during use of impulsive

acoustic sources (*e.g.*, boomers and/or sparkers) and non-impulsive, non-parametric sub-bottom profilers (*e.g.*, Chirps); and a 100-m EZ for all other marine mammals during use of impulsive acoustic sources (*e.g.*, boomers and/or sparkers).

- *Pre-Operation Clearance Protocols:* Ørsted would implement a 30-minute pre-start clearance period of the specified EZs prior to the initiation of ramp-up of boomers, sparkers, and non-impulsive, non-parametric sub-bottom profilers (*e.g.*, Chirps). During this period, the EZs would be monitored by PSOs using the appropriate visual technology. Ramp-up would not be initiated if any marine mammal(s) is within its respective EZ. If a marine mammal is observed within its respective EZ during the pre-start clearance period, ramp-up would not begin until the animal(s) has been observed exiting its respective EZ, or until an additional period has elapsed with no further sighting (*i.e.*, 15 minutes for small odontocetes and seals, and 30 minutes for all other species). Pre-clearance and ramp-up, but not shutdown, would be required when using non-impulsive, non-parametric sub-bottom profilers (*e.g.*, Chirps), except in the case that a North Atlantic right whale is observed within the 500-m EZ.

- *Shutdown of HRG Equipment:* If an HRG source is active and a marine mammal is observed entering or within a relevant EZ (as described above), an immediate shutdown of the HRG survey equipment would be required. Note that this shutdown requirement would be waived for certain genera of small delphinids. If a species for which authorization has not been granted, or, a species for which authorization has been granted but the authorized number of takes have been met, approaches or is observed within the Level B harassment zone (54 m, non-impulsive; 141 m impulsive), shutdown would occur.

- *Vessel strike avoidance measures:* Vessel strike measures include, but are not limited to, separation distances for large whales (500 m North Atlantic right whales,

100 m other large whales; 50 m other cetaceans and pinnipeds), restricted vessel speeds, and operational maneuvers.

- *Seasonal Operating Requirements:* Ørsted would limit to three the number of survey vessels that will operate concurrently from January 1 through May 31 within the Lease Areas (OSC-A 0486/0517, OCS-A 0487, and OCS-A 500) and ECR Area north of the Lease Areas up to, but not including, coastal and bay waters. Ørsted would operate either a single vessel, two vessels concurrently or, for short periods, no more than three survey vessels concurrently in the areas described above from January 1 through May 31. The seasonal restriction described above would help to reduce both the number and intensity of North Atlantic right whale takes by Level B harassment.

- *Reporting:* Ørsted would submit a final technical report within 90 days following completion of the surveys. In the event that Ørsted personnel discover an injured or dead marine mammal, Ørsted would be required to report the incident to NMFS Office of Protected Resources (OPR) (PR.ITP.MonitoringReports@noaa.gov and itp.esch@noaa.gov) and to the New England/Mid-Atlantic Regional Stranding Coordinator through the NOAA Fisheries Marine Mammal and Sea Turtle Stranding and Entanglement Hotline (866-755-6622) as soon as feasible. In the event of a ship strike of a marine mammal by any vessel involved in the activities covered by the authorization, Ørsted would be required to report the incident immediately to NMFS OPR and to the New England/Mid-Atlantic Regional Stranding Coordinator through the NOAA Fisheries Marine Mammal and Sea Turtle Stranding and Entanglement Hotline. Ørsted would be required to immediately cease all project activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the proposed Renewal IHA.

Comments and Responses

As noted previously, NMFS published a notice of the proposed initial IHA (85 FR 48179; August 10, 2020) and solicited public comments on both our proposal to issue the initial IHA for marine site characterization surveys and on the potential for a Renewal IHA, should certain requirements be met.

All public comments were addressed in the notices announcing the issuance of the initial IHA (85 FR 63508, October 8, 2020; 85 FR 71058, November 6, 2020). Below, we describe how we have addressed, with updated information where appropriate, the comment received that specifically pertains to the renewal of the 2020 IHA.

Comment: A group of environmental non-governmental organizations (ENGOS) objected to NMFS' process to consider extending any 1-year IHA with a truncated 15-day comment period, claiming that it is contrary to the MMPA.

Response: NMFS' IHA Renewal process meets all statutory requirements. All IHAs issued, whether an initial IHA or a Renewal IHA, are valid for a period of not more than one year. The public has at least 30 days to comment on all proposed IHAs, with a cumulative total of 45 days for IHA Renewals. As noted above, the **Request for Public Comments** section in the notice of the proposed initial IHA made clear that the agency was seeking comment on both the proposed initial IHA and the potential issuance of a Renewal for this project. Because any Renewal (as explained in the **Request for Public Comments** section) is limited to another year of identical or nearly identical activities in the same location (as described in the **Description of the Proposed Activity** section) or the same activities that were not completed within the 1-year period of the initial IHA, reviewers have the information needed to effectively comment on both the immediate proposed IHA and a possible 1-year Renewal, should the IHA holder choose to request one.

While there are additional documents submitted with a Renewal request, for a qualifying Renewal these are limited to documentation that NMFS will make available

and use to verify that the activities are identical to those in the initial IHA, are nearly identical such that the changes would have either no effect on impacts to marine mammals or decrease those impacts, or are a subset of activities already analyzed and authorized but not completed under the initial IHA. NMFS will also confirm, among other things, that the activities will occur in the same location; involve the same species and stocks; provide for continuation of the same mitigation, monitoring, and reporting requirements; and that no new information has been received that would alter the prior analysis. The renewal request must also contain a preliminary monitoring report, but that is to verify that effects from the activities do not indicate impacts of a scale or nature not previously analyzed. The additional 15-day public comment period provides the public an opportunity to review these few documents, provide any additional pertinent information, and comment on whether they think the criteria for a Renewal have been met. NMFS also will provide direct notice of the proposed Renewal to those who commented on the initial IHA, to provide an opportunity to submit any additional comments. Between the initial 30-day comment period on these same activities and the additional 15 days, the total comment period for a Renewal is 45 days.

In addition to the IHA Renewal process being consistent with all requirements under section 101(a)(5)(D), it is also consistent with Congress's intent for issuance of IHAs to the extent reflected in statements in the legislative history of the MMPA. Through the provision for Renewals in the regulations, description of the process and express invitation to comment on specific potential Renewals in the Request for Public Comments section of each proposed IHA, the description of the process on NMFS' website, further elaboration on the process through responses to comments such as this, posting of substantive documents on the agency's website, and provision of 30 or 45 days for public review and comment on all proposed initial IHAs and Renewals, respectively,

NMFS has ensured that the public “is invited and encouraged to participate fully in the agency decision-making process.”

In prior responses to comments about IHA Renewals (*e.g.*, 84 FR 52464; October 02, 2019 and 85 FR 53342, August 28, 2020), NMFS has explained how the Renewal process, as implemented, is consistent with the statutory requirements contained in section 101(a)(5)(D) of the MMPA, provides additional efficiencies beyond the use of abbreviated notices, and, further, promotes NMFS’ goals of improving conservation of marine mammals and increasing efficiency in the MMPA compliance process. Therefore, we intend to continue implementing the Renewal process. For more information, NMFS has published a description of the Renewal process on our website (available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals>).

Preliminary Determinations

The survey activities proposed by Ørsted are identical to those analyzed in the initial IHA, including the planned number of days and location of activity, as are the method of taking and the effects of the action. Therefore, the amount of take proposed is equal to that authorized in the initial IHA. The proposed mitigation measures and monitoring and reporting requirements, as described above, are identical to the initial IHA. The potential effect of Ørsted’s activities remains limited to Level B harassment in the form of behavioral disturbance. In analyzing the effects of the activities in the initial IHA, NMFS preliminarily determined that Ørsted’s activities would have a negligible impact on the affected species or stocks and that the authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.*, less than one-third of the abundance of all stocks).

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. This

includes consideration of the estimated abundances of five stocks (North Atlantic right whales, fin whales, minke whales, Risso's dolphins, and harbor seals) decreasing and the estimated abundances of two stocks (common dolphins and gray seals) increasing (Hayes *et al.*, 2021). Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable adverse impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) Ørsted's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and; (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the NMFS Greater Atlantic Regional Fisheries Office (GARFO), whenever we propose to authorize take of endangered or threatened species.

The NMFS Office of Protected Resources is proposing to authorize the incidental take of four species of marine mammals that are listed under the ESA: the North Atlantic right, fin, sei and sperm whale. We requested initiation of consultation under Section 7 of the ESA with NMFS GARFO on July 1, 2020, for issuance of the initial IHA. Previously, BOEM consulted with NMFS GARFO under section 7 of the ESA on commercial wind lease issuance and site assessment activities on the Atlantic Outer Continental Shelf in

Massachusetts, Rhode Island, New York and New Jersey Wind Energy Areas. The NMFS GARFO issued a Biological Opinion in 2013 concluding that these activities may adversely affect but are not likely to jeopardize the continued existence of the North Atlantic right, fin, sei and sperm whale. Upon request from the NMFS Office of Protected Resources, NMFS GARFO issued an amended incidental take statement associated with this Biological Opinion on September 25, 2020, to include the take of the ESA-listed marine mammal species authorized through the initial IHA. The proposed Renewal IHA provides no new information about the effects of the action, nor does it change the extent of effects of the action, or any other basis to require reinitiation of consultation with NMFS GARFO; therefore, the incidental take statement issued for the initial IHA remains valid.

Proposed Renewal IHA and Request for Public Comment

As a result of these preliminary determinations, NMFS proposes to issue a Renewal IHA to Ørsted for conducting marine site characterization survey activities offshore from New York to Massachusetts in the areas of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS-A 0486/0517, OCS-A 0487 and OCS-A 0500) and along potential ECRs to landfall locations from New York to Massachusetts from the date of issuance through September 24, 2022, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed initial IHA and the final initial IHA can be found at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-orsted-wind-power-north-america-llc-site-characterization>. We request comments on our analyses, the proposed Renewal IHA, and any other aspect of this Notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: January 3, 2022.

Kimberly Damon-Randall,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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